

1 KEVIN V. RYAN (CASBN 118321)
United States Attorney

2 ROSS W. NADEL (CASBN 87940)
3 Chief, Criminal Division

4 ANNE-CHRISTINE MASSULLO (CASBN 117506)
Assistant United States Attorney

5 450 Golden Gate Avenue, Box 36055
6 San Francisco, California 94102
7 Telephone: (415) 436-6842

8 Attorneys for the United States of America

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12
13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 THOMAS C. TRAUGER,

17 Defendant.
18

No. 03-0308 JSW

PLEA AGREEMENT

19 I, THOMAS C. TRAUGER, and the United States Attorney's Office for the
20 Northern District of California (hereafter "the government") enter into this written plea
21 agreement (the "Agreement") pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal
22 Procedure:

23 The Defendant's Promises

24 1. I agree to plead guilty to count three of the captioned indictment charging me with
25 Falsification Of Records In Federal Investigation, in violation of 18 U.S.C. § 1519 (Sarbanes-
26 Oxley). I agree that the elements of the offense and the maximum penalties are as follows: (1)
27 the defendant altered, destroyed, mutilated, concealed covered up, falsified or made false entries

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1 in any record, document, or tangible object; (2) the defendant did so with the intent to impede,
2 obstruct, or influence the investigation or proper administration of any matter within the
3 jurisdiction of any department or agency of the United States, and (3) the defendant acted
4 knowingly.

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|---|----|---------------------------------|------------|
| 5 | a. | Maximum prison sentence | 20 years |
| 6 | b. | Maximum fine | \$ 250,000 |
| 7 | c. | Maximum supervised release term | 3 years |
| 8 | d. | Mandatory special assessment | \$ 100 |
| 9 | e. | Restitution | \$ N/A |

10 2. I agree that I am guilty of the offense to which I will plead guilty, and I agree that
11 the following facts are true:

12 On or about April 30, 2003, I appeared before the Securities and Exchange Commission
13 ("SEC") in San Francisco pursuant to an administrative subpoena duly issued to me as a partner
14 at the accounting firm of Ernst & Young, LLP ("E&Y"). The purpose of my appearance was to
15 provide testimony under oath regarding the audit work I and the audit team I supervised at E&Y
16 performed on the NextCard, Inc. engagement. I was aware at that time that the SEC was
17 conducting an investigation into the collapse of NextCard, Inc., a once publically traded on-line
18 credit card company. E&Y was engaged by NextCard, Inc. to perform independent auditing
19 services required by SEC rules and regulations. In that capacity, I, as the audit partner for the
20 NextCard engagement, held a position of public trust.

21 During the course of the deposition I was asked to describe the actions I took in response
22 to providing documents called for in a March 1, 2002, subpoena issued by the Office of the
23 Comptroller of the Currency to E&Y. In response to those questions, I did not tell the SEC that
24 certain workpapers related to the annual audit of the financial statements of NextCard Inc. for the
25 year ended December 31, 2000, and the quarterly working papers for the year 2001, had been
26 altered and considerable portions of those workpapers deleted in November 2001. By not
27 informing the SEC of alterations and deletions to the workpapers, I knowingly concealed and
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covered up a record, document, and tangible object, that is the original version of the working papers, with the intent to impede, obstruct, and influence the investigation and proper administration of a matter within the jurisdiction of the SEC, an agency of the United States.

3. I agree to give up all rights that I would have if I chose to proceed to trial, including the rights to a jury trial with the assistance of an attorney; to confront and cross-examine government witnesses; to remain silent or testify; to move to suppress evidence or raise any other Fourth or Fifth Amendment claims; to any further discovery from the government; and to pursue any affirmative defenses and present evidence. I also agree to waive any right to have facts that determine my offense level under the Sentencing Guidelines, including facts that support any specific offense characteristic or other enhancement or adjustment, alleged in an indictment and found by a jury. To the extent that I have a right to have facts that are used to determine the sentence (including any Sentencing Guideline factors, upward adjustments, or upward departures) charged in the indictment by the grand jury and found by a jury at trial beyond a reasonable doubt (see Blakely v. Washington, 124 S. Ct. 2531 (2004)), I waive those rights and agree that the Court will find the facts that enhance my sentence beyond a reasonable doubt," consistent with the Ninth Circuit's holdings in U.S. v. Thomas, 355 F.3d 1191, 1201-02 (9th Cir. 2004) and U.S. v. Banuelos, 322 F.3d 700 (9th Cir. 2003).

4. I agree to give up my right to appeal my conviction, the judgment, and orders of the Court. I also agree to waive any right I may have to appeal my sentence.

5. I agree not to file any collateral attack on my conviction or sentence, including a petition under 28 U.S.C. §2255, at any time in the future after I am sentenced, except for a claim that my constitutional right to the effective assistance of counsel was violated.

6. I agree not to ask the Court to withdraw my guilty plea at any time after it is entered, unless the Court declines to accept the sentence agreed to by the parties. I agree that the government may withdraw from this agreement if the Court does not accept the agreed upon sentence set out below.

7. I agree that my sentence should be calculated pursuant to the Sentencing

Guidelines as follows, and that I will not ask for any other adjustment to or reduction in the offense level or for a downward departure of any kind:

- | | | |
|----|---|----|
| a. | Base Offense Level, U.S.S.G. § 2J1.2 (2003 Edition) | 14 |
| b. | Abuse of Position of Trust, U.S.S.G § 3B1.3 | +2 |
| c. | Acceptance of responsibility:
(If I meet the requirements of
U.S.S.G. § 3E1.1(a) and (b)(1), (2)) | -3 |
| f. | Adjusted offense level | 13 |

8. I agree that an appropriate disposition of this case is as follows: Sentencing Guideline level 13; Criminal History category 1; sentencing range of 12 to 18 months; 3 years of supervised release (with conditions to be fixed by the Court); \$ 5,000 fine; and \$ 100 special assessment. I agree that I will make a good faith effort to pay any fine, forfeiture or restitution I am ordered to pay. Before or after sentencing, I will, upon request of the Court, the government, or the U.S. Probation Office, provide accurate and complete financial information, submit sworn statements and give depositions under oath concerning my assets and my ability to pay, surrender assets I obtained as a result of my crimes, and release funds and property under my control in order to pay any fine, forfeiture, or restitution. I agree to pay the special assessment at the time of sentencing.

9. I agree not to commit or attempt to commit any crimes before sentence is imposed or before I surrender to serve my sentence. I also agree not to violate the terms of my pretrial release (if any); intentionally provide false information to the Court, the Probation Office, Pretrial Services, or the government; or fail to comply with any of the other promises I have made in this Agreement. I agree that, if I fail to comply with any promises I have made in this Agreement, then the government will be released from all of its promises in this agreement, including those set forth in paragraphs 12 through 14 below, but I will not be released from my guilty plea.

10. I agree that this Agreement contains all of the promises and agreements between the government and me, and I will not claim otherwise in the future.

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1 11. I agree that this Agreement binds the U.S. Attorney's Office for the Northern
2 District of California only, and does not bind any other federal, state, or local agency.

3 The Government's Promises

4 12. The government agrees to move to dismiss any open charges pending against the
5 defendant in the captioned indictment at the time of sentencing.

6 13. The government agrees not to file or seek any additional charges against the
7 defendant that could be filed as a result of the investigation that led to the captioned indictment.

8 14. The government agrees that the appropriate sentencing range in this case should
9 be as set forth in paragraph 8 above and that it will recommend the low-end of that range, 12
10 months, as the appropriate sentence, unless the defendant violates the agreement as set forth in
11 paragraph 9 above.

12 The Defendant's Affirmations

13 15. I confirm that I have had adequate time to discuss this case, the evidence, and this
14 Agreement with my attorney, and that he has provided me with all the legal advice that I
15 requested.

16 16. I confirm that while I considered signing this Agreement, and at the time I signed
17 it, I was not under the influence of any alcohol, drug, or medicine.

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2 17. I confirm that my decision to enter a guilty plea is made knowing the charges that
3 have been brought against me, any possible defenses, and the benefits and possible detriments of
4 proceeding to trial. I also confirm that my decision to plead guilty is made voluntarily, and no
5 one coerced or threatened me to enter into this agreement.

6 Dated: _____

7 THOMAS C. TRAUGER
8 Defendant

9 KEVIN V. RYAN
10 United States Attorney

11 Dated: _____

12 ANNE-CHRISTINE MASSULLO
Assistant United States Attorney

13 I have fully explained to my client all the rights that a criminal defendant has and all the
14 terms of this Agreement. In my opinion, my client understands all the terms of this Agreement
15 and all the rights he is giving up by pleading guilty, and, based on the information now known to
16 me, his decision to plead guilty is knowing and voluntary.

17 Dated: _____

18 EDWARD W. SWANSON, ESQ.
19 Swanson & McNamara LLP
Attorney for Defendant

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